

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

March 18, 2003

IN RE:

COMPLAINT OF MR. MICHAEL
VAN WIES AGAINST CENTURYTEL
OF OOLTEWAH-COLLEGEDALE

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DOCKET NO.
02-00058

INITIAL ORDER DISMISSING COMPLAINT

This matter came before the Hearing Officer of the Tennessee Regulatory Authority (the "Authority" or "TRA") at a Hearing on the merits of a formal complaint (the "*Complaint*") against CenturyTel of Ooltewah-Collegedale ("CenturyTel") filed on January 15, 2002 by Michael Van Wies. At the Hearing, which was convened on January 30, 2003, the Hearing Officer dismissed the *Complaint* for the reasons stated below.

Background

The *Complaint* is contained in a letter to the Authority's Executive Secretary filed on January 15, 2002. A cover sheet accompanying the *Complaint* entitled the action:

PETITION TO PERMANENTLY REVOKE CERTIFICATE OF
PUBLIC CONVENIENCE AND NECESSITY TO OPERATE A
TELECOMMUNICATIONS COMPANY & RELATED SERVICES FOR
CENTURYTEL OF OOLTEWAH-COLLEGEDALE, INC. DBA
CENTURYTEL CORPORATION, INC., LLC, 100 CENTURYTEL DRIVE
MONROE, LA 71203, 318-388-9000.¹

In a general discussion of CenturyTel, Mr. Van Wies states in his *Complaint*:

¹ *Complaint*, Cover Sheet (January 15, 2002).

We are tired of dealing with a company that does not want to do business here anymore. We have spoken with their executive, engineering, sales, regulatory, legal and marketing folks over the last two years to fix the problems, which affect the quality of life, and the aiding of the disabled in our community. The result is always the same—go take a walk, we have the monopoly here and that's the way it will be.²

The *Complaint* then lists nine bulleted grievances.³ Following this list, the *Complaint* concludes:

It boils down to this. Everywhere that CenturyTel runs a service area, they nickel and dime their business and residential customers to death. Cutting corners for the sake of the stockholder at the customers' expense is playing with peoples' lives businesses, schools, medical offices, etc. CenturyTel is giving a visible signal that they do not want to provide telecommunications services here in our area anymore. We invite them to formulate a business plan, and let BellSouth or another Provider, perhaps Sprint local, to come in here and serve the now bustling cities of Chattanooga, Collegedale, and the towns of Ooltewah, and Apison.⁴

On February 22, 2002, CenturyTel filed a *Motion to Dismiss*, which addressed each of Mr. Van Wies's grievances and asserted that his *Complaint* should be dismissed because (1) it fails to state a claim upon which relief may be granted, (2) CenturyTel may not transfer or abandon its certificate of public convenience and necessity ("CCN"), and (3) CenturyTel serves its Ooltewah customers well.

Mr. Van Wies, in a letter to the Executive Secretary dated March 1, 2002, made the following discovery requests:

In specific for items #1, & 2, we want CenturyTel to provide for the Tennessee Regulatory Authority the date that the "RECENT CHANGE MESSAGES" were input to their DMS-100 switch to activate these features for public use basis.

In regard to item #6, we want CenturyTel to provide the Tennessee Regulatory Authority, with "TRUNK OVERFLOW DATA FOR THE CHATTANOOGA TANDEM TRUNK GROUP", during PEAK TRAFFIC PERIODS. CenturyTel has stated that they have not experienced any recent trunk blockages, which

² *Id.*, p. 1.

³ *Id.*, pp. 2-3.

⁴ *Id.*, p. 3.

violate TRA call completion rate standards, this would imply that they have violated these standards in the past. As per TRA Rule 1220-4-2-.34(4) (requiring quarterly formal reports and ADDITIONAL REPORTS WHEN SURVEILLANCE REVEALS SERVICE PROBLEMS). We want CenturyTel to produce for us, the DMS-100 switch data used to compile the quarterly report for THIRD QUARTER (JULY, AUGUST & SEPTEMBER) 2001, and a copy of the corresponding report as provided to the TRA. My experience during this period was an abnormally high call failure rate. I would also like data as to when and if any additional reports were filed due to service problems.⁵

In a letter filed on June 24, 2002, Mr. Van Wies withdrew all but one of his claims against CenturyTel. The single remaining claim was claim number 6, which is stated on page 2 of the *Complaint* and quoted in CenturyTel's *Motion to Dismiss* at page 5. This claim is as follows:

Also the reason for getting the FX line in a residence is that CenturyTel does not have enough trunks. Certain times of the day and on weekends you can't even complete calls into the City of Chattanooga Tandem. So we bear an additional expense, and let CenturyTel control my family's local and long distance calling pattern. So now we by-pass their local DMS-100 switch, and get BellSouth dial tone in my home. We call when and where we want to without interference.⁶

In an Order issued on December 6, 2002, which addressed discovery disputes between the parties, the Hearing Officer stated that it was his intention to resolve CenturyTel's *Motion to Dismiss* in the course of a Hearing on the merits.⁷ The December 6, 2002 Order dismissed all claims other than claim number 6 without prejudice and set forth guidelines for a Hearing as follows:

The Hearing Officer determines that a Hearing shall be held as soon as possible to bring this case to a resolution. The Hearing, including the testimony of all witnesses, shall be strictly limited to two (2) areas. The first is claim No. 6 as stated at page 2 of the *Complaint* and quoted on page 5 of CenturyTel's *Motion to Dismiss*:

⁵ Letter/Discovery Requests from Michael Van Wies to K. David Waddell, pp. 1-2 (March 1, 2002) (Emphasis in original).

⁶ *Complaint*, p. 5 (January 15, 2002); *Motion to Dismiss*, p. 5 (February 22, 2002).

⁷ *Order Granting in Part and Denying in Part CenturyTel's Motion to Compel, Granting in Part and Denying in Part Mr. Van Wies's Motion to Compel, and Setting Forth Guidelines for Hearing*, p. 3 (December 6, 2002).

Also the reason for getting the FX line in a residence is that CenturyTel does not have enough trunks. Certain times of the day and on weekends you can't even complete calls into the City of Chattanooga Tandem. So we bear an additional expense, and let CenturyTel control my family's local and long distance calling pattern. So now we by-pass their local DMS-100 switch, and get BellSouth dial tone in my home. We call when and where we want to without interference.

The second area is any discovery disputes related to claim number 6.

Mr. Van Wies should be aware that, at least on its face, CenturyTel's defense to his original request for relief has merit. Mr. Van Wies requested in his *Complaint* that the Authority revoke CenturyTel's CCN. In its *Motion to Dismiss*, CenturyTel stated:

TRA regulations provide appropriate avenues for customer complaints about service quality, but no where do they authorize the revocation of a telephone company's Certificate for the reasons outlined by the Petitioner.

CenturyTel further states:

Petitioner's filing fails to set forth a claim upon which relief may be granted even if it were interpreted as a request CenturyTel's to abandon its Certificate to another telecommunications provider. [sic] See Complaint, p. 3, ¶ 4. CenturyTel is barred in this case as a matter of law from abandoning its Certificate since it is a provider with carrier of last resort obligations. TRA Rule § 1220-4-8-.05(1); T.C.A. § 65-4-201(c). Nor can Petitioner's filing be construed as a request to transfer CenturyTel's Certificate. TRA rules require that a Certificate may only be transferred to another provider who meets the requirements of T.C.A. § 65-4-201(c). TRA Rule § 1220-4-8-.05(2). That statute requires a telecommunications provider to demonstrate that it has the financial, managerial, and technical wherewithal to provide the applied for service before it may receive a Certificate. T.C.A. § 65-4-201(c). Neither BellSouth nor Sprint nor any other eligible telecommunications company is a party to this case or is applying to receive the respondent's Certificate.

The Hearing Officer finds this argument to be essentially correct, although not necessarily based on the legal authority cited. Suffice it to say that CenturyTel has a right, granted by the State of Tennessee pursuant to Tenn. Code Ann. § 65-4-201, to provide service in its service area. CenturyTel also has a duty to provide service in its service area, and it may not abandon its service area without the Authority's approval.

Nevertheless, a pleading should be read in terms of the alleged facts and not limited to the requested relief. Further, it is appropriate to afford some leeway in construing a pleading by a party acting pro se. At the beginning of the Hearing, Mr. Van Wies should be prepared to state the relief he requests from the Authority, bearing in mind that it is extremely unlikely that the Authority would revoke CenturyTel's CCN.

...

All other claims in the *Complaint* are dismissed without prejudice. The Hearing Officer cautions Mr. Van Wies that should he ever choose to renew the other claims in his *Complaint*, he should not do so for the purpose of harassing CenturyTel, but should make a good faith attempt to show a connection between some inadequacy in CenturyTel's service, how such inadequacy has adversely affected him, and some feasible relief that the Authority can grant.⁸

The January 30, 2003 Hearing

Pursuant to a Notice of Hearing issued on January 16, 2003, a Hearing on the merits was convened on January 30, 2003, at the offices of the TRA. The following parties were in attendance:

Mr. Michael Van Wies; 8504 Horseshoe Bend Lane, Ooltewah, Tennessee 37363

CenturyTel of Ooltewah-Collegedale, Inc. – **R. Dale Grimes, Esq., Ross L. Booher, Esq.**; Bass, Berry & Sims, PLC, 315 Deaderick Street, Suite 2700, Nashville, Tennessee 37238

During the Hearing, Mr. Van Wies was asked to state the form of relief he was requesting, as directed in the December 6, 2002 Order. Mr. Van Wies stated: "I'm going to ask that there are certain TRA rules and regulations about recordkeeping which is at issue here."⁹ Mr. Van Wies further stated: "I believe I can present a good case that those rules have been violated and their claims of providing service has not been provided."¹⁰ The Hearing Officer also asked Mr. Van Wies specifically what relief he was seeking. Mr. Van Wies stated:

I don't want any financial money. I want the State to take whatever action the State is required to do. If it needs to levy a fine to make them follow the rules, if they violated the rules, and punitive damages I guess would be what you would

⁸ *Id.*, pp. 13-14 (Internal citations omitted.)

⁹ Transcript of Hearing, p. 9 (January 30, 2003).

¹⁰ *Id.*, p. 10.

call it. And that money would go to the State, not to me.¹¹

When asked to specify which rules he claimed CenturyTel had violated, Mr. Van Wies at first identified certain rules which turned out to be draft rules that have been proposed by the Authority but are not currently in effect. Mr. Van Wies was provided with a copy of part 1220-4-2 of the Authority's current rules. Mr. Van Wies then named Authority Rules 1220-4-2-.04, 1220-4-2-.05, 1220-4-2-.28, and 1220-4-2-.34(3).¹² The current form of these rules is as follows:

1220-4-2-.04 LOCATION OF RECORDS.

- (1) Unless otherwise authorized by the Commission, all records required by these rules shall be kept within the state or shall be made available to the Commission or its authorized representatives upon request.¹³

1220-4-2-.05 RETENTION OF RECORDS.

- (1) All records required by these rules shall be preserved for the period of time specified in the current edition of the Federal Communications Commission's record retention schedule.¹⁴

1220-4-2-.28 ADEQUACY OF SERVICE.

- (1) Each utility shall employ engineering and administrative procedures to determine the adequacy of service being provided to the customer.¹⁵

1220-4-2-.34 SERVICE OBJECTIVES AND SURVEILLANCE LEVELS.

- (3) Each utility shall make measurements to determine the level of service for each item included in these rules to the extent feasible. In central offices of such size that recording equipment is not presently, or normally, installed for the purpose of measuring accurately such functions as dial tone speed and central office overflows, this rule does not mandate the installation of such measuring equipment. Each utility shall, however, make the necessary physical checks and observations in such offices to assure that levels of service on any of the items included herein are being maintained.¹⁶

The Hearing Officer asked Mr. Van Wies to describe the information that he had requested from CenturyTel. After some discussion by Mr. Van Wies and counsel for CenturyTel, it appeared that Mr. Van Wies had requested hourly, daily, and monthly trunk report

¹¹ *Id.*, pp. 10-11.

¹² *Id.*, p. 16.

¹³ Tenn. Comp. R. & Regs. 1220-4-2-.04.

¹⁴ Tenn. Comp. R. & Regs. 1220-4-2-.05.

¹⁵ Tenn. Comp. R. & Regs. 1220-4-2-.28.

¹⁶ Tenn. Comp. R. & Regs. 1220-4-2-.34(3).

data generated by the DMS-100 switch.¹⁷ The Hearing Officer then asked Mr. Van Wies: “What rule requires [CenturyTel] to produce or retain those records?”¹⁸ Mr. Van Wies identified Rule 1220-4-2-.34(3). The Hearing Officer then asked: “[I]s there any other rule that in your opinion requires CenturyTel to produce to the Authority or retain those records?”¹⁹ Counsel for CenturyTel argued that Rule 1220-4-2-.34(3) does not require the retention or even the creation of any records.²⁰

Mr. Van Wies then cited Rule 1220-4-2-.05. Mr. Van Wies produced a copy of 47 C.F.R. § 42.7. This section of the Code of Federal Regulations reads as follows:

Retention of other records.

Except as specified in 42.6, each carrier shall retain records identified in its master index of records for the period established therein. Records relevant to complaint proceedings not already contained in the index of records should be added to the index as soon as a complaint is filed and retained until final disposition of the complaint. Records a carrier is directed to retain as the result of a proceeding or inquiry by the Commission to the extent not already contained in the index will also be added to the index and retained until final disposition of the proceeding or inquiry.²¹

The Hearing Officer stated:

So really what we're looking for is something that would require [retention of records] in our rules. Now, as I read those, it's not required by those two rules. It just says if records are required to be kept, then they have to be kept for the period specified in the FCC regulations.²²

Mr. Van Wies then cited Rule 1220-4-2-.05, and the following exchange took place:

HEARING OFFICER: Are you saying that that rule requires the creation or retention of records?

¹⁷ Transcript of Hearing, p. 20 (January 30, 2003). It appears that this was the data to which Mr. Van Wies was referring in his March 1, 2002 request that CenturyTel produce “the DMS-100 switch data used to compile the quarterly report for THIRD QUARTER.” Letter/Discovery Requests from Michael Van Wies to K. David Waddell pp. 1-2 (March 1, 2002).

¹⁸ Transcript of Hearing, p. 22 (January 30, 2003). .

¹⁹ *Id.*, p. 23.

²⁰ *Id.*

²¹ 47 C.F.R. § 42.7.

²² Transcript of Hearing, p. 27 (January 30, 2003).

MR. VAN WIES: That data – the data that I requested, the raw data, off that DMS-100 determines the adequacy of the service. And up to this point the raw data, and that data only, out of this switch – not reports – compiled is what we're here for.²³

Because it appeared that Mr. Van Wies might still be pursuing some claim with regard to adequacy service by CenturyTel, Mr. Van Wies was permitted to call his witness, Mr. John Russell. Counsel for CenturyTel then pointed out that Mr. Van Wies had been asked to identify the relief he was requesting and had stated only that he was requesting that the Authority fine CenturyTel for having violated the Authority's rules concerning retention and production of records.²⁴ At that point during the January 30, 2003 Hearing, because Mr. Van Wies limited his complaint and his requested relief to his contention that CenturyTel violated Authority Rules 1220-4-2-.04, 1220-4-2-.05, 1220-4-2-.28, and 1220-4-2-.34(3), the Hearing Officer dismissed the remaining portion of Mr. Van Wies's *Complaint*.²⁵

The Hearing Officer finds that any failure by CenturyTel to retain or produce the hourly, daily, and monthly trunk data generated by the DMS-100 switch, which was the information Mr. Van Wies identified during the January 30, 2003 Hearing as the sole object of his complaint and request for relief, was not in violation of Authority Rule 1220-4-2-.04, 1220-4-2-.05, 1220-4-2-.28, or 1220-4-2-.34(3). This finding is based upon the conclusion that the rules Mr. Van Wies cited do not require CenturyTel to create, retain, or produce the designated information. Rule 1220-4-2-.04 refers to a requirement that regulated carriers create and retain certain records.

²³ *Id.*, p. 28.

²⁴ *Id.*, p. 37.

²⁵ As explained above, Mr. Van Wies was given the opportunity to restate his claim against CenturyTel and the relief he was requesting, in a manner consistent with claim number 6, at the beginning of the Hearing. Mr. Van Wies limited his restated claim and prayer for relief to an allegation that CenturyTel violated the Authority's rules governing the creation, retention, and production of records and a request that the Authority fine CenturyTel for this alleged violation. Therefore, in dismissing Mr. Van Wies's *Complaint*, the Hearing Officer considered Mr. Van Wies to have voluntarily dismissed claim number 6, as stated in the *Complaint*, at the beginning of the Hearing. See Transcript of Hearing, pp. 9-10 (January 30, 2003).

Rule 1220-4-2-.05 requires carriers to preserve records required by the Authority's rules for a certain period of time, which period is determined by reference to the FCC's rules.

The Hearing Officer does not conclude that the FCC rule cited by Mr. Van Wies has any bearing on Authority Rule 1220-4-2-.05 or make any other finding regarding the FCC rule. The Hearing Officer concludes that Authority Rules 1220-4-2-.28 and 1220-4-2-.34(3) do not require a carrier to create, retain, or produce to the Authority any particular records. Even if a carrier creates records in the course of complying with Rules 1220-4-2-.28 and 1220-4-2-.34(3), neither Rule 1220-4-2-.04 nor Rule 1220-4-2-.05 would create any obligation to retain such records or require the carrier to produce the records to the Authority.²⁶ Mr. Van Wies has not cited any other rule that would require CenturyTel to create, retain, or produce to the TRA records containing the requested information, and the Hearing Officer is not aware of any such rule or requirement.

In the December 6, 2002 Order, the Hearing Officer stated with regard to the claims which were dismissed without prejudice in that Order :

The Hearing Officer cautions Mr. Van Wies that should he ever choose to renew the other claims in his *Complaint*, he should not do so for the purpose of harassing CenturyTel, but should make a good faith attempt to show a connection between some inadequacy in CenturyTel's service, how such inadequacy has adversely affected him, and some feasible relief that the Authority can grant.²⁷

This statement still applies, emphatically, to the claims Mr. Van Wies originally listed in his *Complaint* but were dismissed in the December 6, 2002 Order. Claim number 6 and all discovery claims stated by Mr. Van Wies during the January 30, 2003 Hearing are hereby

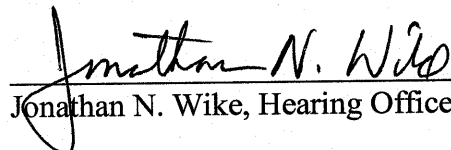
²⁶ When the Authority's rules require that a carrier create, retain, or produce certain records, the Authority's Rules state this requirement clearly and explicitly. Such a provision is contained in Authority Rule 1220-4-2-.33, which requires that "[e]ach telephone utility shall maintain an accurate record of trouble reports made by its customers." Authority Rules 1220-4-2-.04 and 1220-4-2-.05 would govern the location and retention of such records of trouble reports.

²⁷ *Order Granting in Part and Denying in Part CenturyTel's Motion to Compel, Granting in Part and Denying in Part Mr. Van Wies's Motion to Compel, and Setting Forth Guidelines for Hearing*, p. 15 (December 6, 2002).

dismissed with prejudice. Therefore, Mr. Van Wies's *Complaint* is dismissed in its entirety.

IT IS THEREFORE ORDERED THAT:

1. The *Complaint* is dismissed in its entirety.
2. Claim number 6 of the *Complaint* and all claims stated by Mr. Van Wies during the January 30, 2003 Hearing are dismissed with prejudice.
3. Any party aggrieved by the Hearing Officer's decision in this matter may file a Petition for Reconsideration with the Hearing Officer within fifteen (15) days from the date of this Order.
4. Any party aggrieved by the decision of the Hearing Officer in this matter may file a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Order.
5. In the event this Order is not appealed to the Directors of the Tennessee Regulatory Authority within fifteen (15) days, and no Petition for Reconsideration has been filed, this Order shall become final and shall be effective from the date of entry. Thereafter, any party aggrieved by the decision of the Hearing Officer may file a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from the date of this Order.


Jonathan N. Wike, Hearing Officer